United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

W/affidavit of 3 mailing

75-7061

To be argued by
DAVID P. LAND,
LEONARD KOERNER, and
JOHN DE P. DOUW

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7061

TRINITY EPISCOPAL SCHOOL CORP., et al.,
Plaintiffs-Appellants,

—and—

ROLAND H. KARLAN, et al.,
Intervening Plaintiffs-Appellants,

—v.—

THE UNITED STATES DEPARTMENT OF HOUSING and URBAN DEVELOPMENT, et al., THE CITY OF NEW YORK, et al.,

Defendants-Appellees,

—and—

STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.,
Intervening Defendant-Appellee.

BRIEF OF DEFENDANTS-APPELLEES

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Issue Presented for Review

Did the Court below properly find that the determinations by the Federal, State and City governments to construct a 160 unit low income housing project within the West Side Urban Renewal Area of Manhattan complied with all required statutory procedures and that plaintiffs failed to establish any factual basis showing that the governments erred in their administrative determinations?

Statement of the Case

Plaintiffs brought this action to obtain various types of injunctive relief which would affect the West Side Urban Renewal Area and the community's 35,000 present and former residents. The community consists of a 20 block rectangular area, ten blocks long bounded by 87th and 97th Streets and two blocks wide bounded by Central Park West and Amsterdam Avenue. Plaintiffs sought to enjoin the defendants from constructing a 160 unit low income apartment building to be located on Site 30 of the West Side Urban Renewal Area between 90th and 91st Streets on Columbus Avenue. In addition, they sought the forcible removal of about 250 families of the community whom plaintiffs classify as illegal squatters. Finally, they sought an order that no more than 30% of the rental units in new middle income buildings be allocated to low income families.

The Honorable Irving Ben Cooper, United States District Judge for the Southern District of New York, in a 122 page opinion filed on November 15, 1974, denied plaintiffs all relief and dismissed their complaints. Plaintiffs appeal from all aspects of Judge Cooper's legal and factual findings. Judge Cooper's opinion is an exegesis of the history of the community and of the West Side Urban Renewal Plan, the social and economic make-up of the community, and the nature and quality of the community's public and private facilities. Judge Cooper's comprehensive and thoroughly documented opinion left no room for doubt as to the validity of his findings.

It was not anticipated that an appeal would follow. Nevertheless on the last day to do so, plaintiffs filed their notice of appeal. Immediately after plaintiffs filed their appeal, the defendants requested a conference before the Staff Counsel of this Court for the purpose of expediting the appeal. Defendants submitted the affidavit of Joseph Christian, Chairman of the New York City Housing Authority.

Chairman Christian stated that the Housing Authority's private contractor for Site 30 would not proceed until this litigation was completely finished and that the $6,090,000 committed by HUD in 1972 to build 160 apartment units on Site 30 was now sufficient for only 130. This Court's order of January 24, 1975 expedited the appeal. For the time being plaintiffs enjoy the practical effect of an injunction as to Site 30 to which they were not entitled.

On this appeal plaintiffs challenge virtually every factual and legal finding by Judge Cooper. However, in their brief, plaintiffs admit that every factual finding was supported by evidence, but they contend that the factual issues could have been determined differently. We contend that all of Judge Cooper's findings were thoroughly supported by the evidence and not subject to doubt, and that plaintiffs' theory on appeal affords no basis to disturb the factual determinations. As to the legal findings, we contend that Judge Cooper properly applied the law, and we rely primarily on the analysis contained in his opinion.

ARGUMENT

POINT I

Plaintiff's claim that the purpose of the Urban Renewal Plan was to create a new community is wrong.

Plaintiffs begin their appellants' brief by asserting that the purpose of the West Side Urban Renewal Plan was to "create a new balanced community" [App. Br. 1] in which the old community was to be "destroyed" [App. Br. 7]. This claim is wrong. Based upon the record of the Plan and the testimony at trial which was extensively quoted in the opinion, Judge Cooper properly found that the objective was "not to create a new community but rather to preserve

and improve the existing community so as to continue to accommodate the varied needs of its population." [Op. 11]. The reason for preservation was that the community had residual strengths, including good housing on Central Park West and the brownstone side streets [Op. 10], that during the 1950s the community's median income increased more than one-third [Op. 11], and that to correct abuses of prior renewal efforts both middle and low income housing would be built "more in line with the needs of the people in these categories." [Op. 14 ¶ 1]. Also, an essential element of the renewal policy was that all persons removed from the community during rehabilitation (primarily low income families) had the right to relocate within the community [Op. 38]. Even now there are many persons who have not yet enjoyed their right of return [Op. 40]. Part of the reason for the unmet needs of low income relocatees is that as of 1966 five low income housing projects were planned for the community, but in 1966 one site, Site 36, was converted from low income use to middle income use [Op. 23-24]. Thus, the Site 30 project can be viewed as filling the gap created in 1966; it does not represent a deviation from the long-established policy to provide housing for low income relocatees.

The distinction between plaintiffs' claim of destruction and re-creation and the actual purpose of preservation and renewal to meet the needs of the community is significant because the Plan proceeded and is proceeding as intended. Plaintiffs, as the owners of $200,000 brownstones, a private school, and a residential housing building simply complain that the Plan is reaching conclusion as intended and that both middle income and low income residents now have permanent decent housing within the community. Presumably, their hope was that the low income residents would be permanently removed as the renewal was completed and that plaintiffs would not live in a truly racially and economically integrated area. Evidence of plaintiffs' misconception is contained in their written submissions to HUD

and included in HUD's Special Environmental Clearance Study [Ex. E]. Plaintiff Continue's April 14, 1972 letter (page 2) states that plaintiffs' objective is to ensure that "communities absorb their fair share of low income families." At trial, the author of this letter, Dr. Jerome Fine, testified that this community's "fair share" was between 15%-20% but closer to 15%, and that other communities' "fair share" should be as much as 30% [Tr. 1365-67].

In summary then, plaintiffs' underlying dispute is with the policy of the Federal, State and City governments that otherwise sound central city communities with spots of deterioration should be preserved and renewed to meet the needs of the *entire community* including the needs of their low income residents and minority residents. To reverse Judge Cooper will merely deprive certain people of their equal rights to decent housing and concentrate them within the ghettos of this City. Low income families and minority people must have decent housing. It is no error for government to renew a sound community by providing housing for all the community's residents. The vindication of that policy is what this suit was all about.

POINT II

Plaintiffs' claim that the community is becoming a ghetto was without factual proof and contrary to the proof.

Throughout their brief, plaintiffs assert without evidentiary foundation that the community is becoming a ghetto and that the construction of Site 30 and the presence of squatters will contribute to "ghettoization". Judge Cooper found plaintiffs' claims without merit.

In determining whether a community may become a ghetto, Judge Cooper analyzed three factors: (1) statistical

data, (2) the community's facilities, and (3) the community's view of itself. All three factors established the absence of incipient "ghettoization".

As to statistics, Judge Cooper properly found [Op. 64-67] that this community has a lesser percentage of minorities, a lesser percentage of single parent families with minor children, a lesser percentage of poverty families, and a greater median income than the larger West Side community, Manhattan or New York City. Even plaintiffs' expert sociological witness, Dr. Frank Kristof, testified that the community was and continues to be strong and stable and is among the upper 25% of New York City communities [Op. 67]. Judge Cooper properly concluded that there was no evidence that the community might become a ghetto.

As to the community facilities, plaintiffs did not dispute the findings contained in HUD's Site Selection Criteria Study [Exhibit B]* or the Special Environmental Clearance Study [Exhibit E] that the community has good public transportation, the use of fine parks and many cultural facilities, a variety of commercial and retail shops serving the community's needs, much luxury housing along Central Park West and the east-west brownstone streets, much middle income housing along Columbus Avenue, a host of public and private schools, adequate health facilities, good police protection, and the climate of a racially and economically sound community. However, plaintiffs contend that there is increasing crime. Judge Cooper accepted the uncontradicted testimony and documents presented by the Police Captain [Op. 76] of a marked decrease in crime since 1971 and joint police-community efforts to prevent crime. Also, plaintiffs assert that the quality of public

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* Plaintiffs stipulated [Tr. 42-43] that they "take no issue with the conclusions [HUD] arrived at there", but asserted that such factual conclusions were "irrelevant to this proceeding."

education is poor. Judge Cooper accepted the uncontradicted testimony from the community's public school administrators that the quality of the elementary education is outstanding and that the quality of the junior high school education is improving. [Op. 77-78]

As to the community's view of itself both plaintiffs and defendants presented witnesses who testified about their subjective feelings. As to plaintiffs' witnesses Judge Cooper properly found that they were members of Continue and represented a small portion of the community. [Op. 75]. Notwithstanding proof of incidents of disorderly conduct within the community, Judge Cooper generally accepted defendants' testimony that the community "is safe and free of any noticeable degree of anti-social behavior." [Op. 76]. Also, Judge Cooper was strongly persuaded by the testimony of the building superintendent of one of the largest apartments having about 50% low income families that anti-social conditions decreased by 40% since 1972 [Op. 75].

Part of plaintiffs' theory was that the community cannot safely accommodate more than 2,500 low income families because the "2,500" figure was the City's estimate of the number of low income families in need of housing. Judge Cooper properly found that the "2,500" policy had nothing to do with the community's stability. Plaintiffs' expert testified that if the low income needs were 1,000 or 5,000 then either of those figures would be the maximum low income families that the community could absorb without becoming a ghetto [Op. 82]. Such arbitrary ceilings simply had no correlation to the factors which may make a community a ghetto. Also, to the extent that the presence of social problems is a symptom of a ghetto, plaintiffs' expert testified that low income families (other than, in his opinion, welfare and single parent families) cannot be associated with a propensity for social problems [Op. 104]. Thus, the mere presence of a large percentage of low income families within a community is not proof of community instability. In addi-

tion, Judge Cooper accepted the defendants' expert testimony that the community could safely meet the needs of up to 4,000 low income families without resulting in community deterioration [Op. 85]. Accordingly, Judge Cooper properly rejected plaintiffs' theory that the community will become a ghetto if more than 2,500 low income families reside within it. The testimony of both lay and expert witnesses supported Judge Cooper's determination that the construction of low income housing on Site 30, the presence of squatters and more than 2,500 low income families within the community would not "tip" the community [Tr. 2541, 2636, 2641-42, 3196, 3554, 3700, 3705, 3786, 3788-89, 3800, 3810].

Based upon the totality of the record which was comprehensively cited and reviewed by Judge Cooper, plaintiffs cannot show that Judge Cooper made reversible factual error in finding that the community was not tending to become a ghetto or that Site 30 would adversely affect the community.*

POINT III

Plaintiffs' claim that the City made binding oral representations about the number of low income residents was properly found to be without factual or legal merit.

Appellants' brief at pages 4-5 impliedly asserts that Trinity's representative, Eliot Lumbard, received oral representations from the City that about 2,500 units of low

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* The plaintiffs also sought to enjoin the conversion of Site 4 from middle income to low income housing. The construction of the 270-unit apartment house on Site 4 would not affect the findings of the District Court that the West Side Area does not contain an excessive minority or low income concentration and that the quality of its services is adequate. In any event, Site 4 is unfunded.

income housing would be built and that no more than 30% of middle income units would be for low income persons. They cite page 1091 of the transcript of Mr. Lumbard's testimony which not only does not support their claim, but is contrary to it.* Throughout their brief, they say that brownstone purchasers received similar oral representations. Plaintiffs said they dealt with the Honorable Milton A. Mollen, Chairman of the Housing and Redevelopment Board, and Messrs. Hunter and Luria, as site representatives. Judge Mollen testified that he would not undertake to represent that he could bind the City as to this matter. Hunter testified that he made no such representations, and the parties stipulated that Luria would testify the same as Hunter [Op. 49]. Plaintiffs simply did not prove that any oral representations were made; and Judge Cooper found that "plaintiffs have failed to show that the City or its employees ever made a commitment to a fixed and immutable number or percentage of low income units" [Op. 50]. Indeed, the Court found that the figure of "2,500" was not intended as a maximum or a minimum [Op. 37]. The testimony by the Honorable Milton A. Mollen, Congressman Herman Badillo, and the Honorable Roger Starr supported this finding of the Court [Tr. 441, 3677, 3682, 3836].

Even if these oral representations were made, Judge Cooper properly found as a matter of law that they could not bind the City [Op. 49-50], that the parol evidence rule would not permit such oral representations to govern plaintiffs' contracts [Op. 46], that the various merger clauses in plaintiffs' contracts precluded use of parol evidence [Op. 47-48], and that the terms of the contracts permitted the City to alter the Urban Renewal Plan [Op. 46, 48, 51-53]. See also *Plum Tree, Inc.* v. *N. K. Winston Corp.*, 351 F. Supp. 80, 83-84 (S.D.N.Y. 1972); and *Jones Memorial Trust* v. *TSAI Investment Services, Inc.*, 367 F. Supp. 491 (S.D.N.Y. 1973).

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* Mr. Lumbard testified that he could not recall receiving such oral representations from the City, but that this information came from Trinity's counsel in this action.

The types of claims raised by the plaintiffs here have been rejected in *Citizens Committee for Faraaay Wood* v. *Lindsay*, Slip. Op. 585, 597 (2d Cir., Dec. 5, 1974), which held that a person does not have a contract claim against the City based upon representations by the city housing officials because such City proposals are required to be approved by the Board of Estimate before the City may enter into binding commitments.

The claim that the City's contracts with Karlan and Hudgins required their written consents before the City could proceed with Site 30 was found to be without merit [Op. 51-54]. The testimony showed that changes within Urban Renewal plans are common and to be anticipated with one of the magnitude of the West Side Urban Renewal Plan [Tr. 398-400, 935, 3672].

POINT IV

Plaintiffs' claim that the squatters are disruptive to the community is without basis.

Plaintiffs assert that the squatters are the cause of much neighborhood trouble. They say that squatter homes "are deplorable and not fit for human habitation" [App. Br. 25]. However, Dr. Browne testified that the squatters, through their own energy and efforts, had fixed up their buildings [Tr. 3541]. The chairman of plaintiff Continue, Dr. Fine, admitted that squatter houses have essential services [Tr. 1520] and that he was "pleased" that the squatters have leases with the City [Tr. 1522]. Also, Police Captain Prezioso testified that the squatters have caused the police only one problem and that of minor significance [Tr. 3648-49]. There was no evidence for the broad claims now made by plaintiffs. Admittedly, plaintiffs' witnesses did testify that people they believed to be squatters on 88th Street were guilty of offensive behavior. However, Judge Cooper properly pointed out that the plaintiffs "did not pursue the

matter" and "'failed to exhaust the available administrative remedies . . . as a possible means of preserving the area and freeing it of truly undesirable persons" [Op. 84].

Finally, plaintiffs assert on this appeal [App. Br. 13, 25] that the squatters were a "large group" who "forcibly" took possession of their buildings, and that they were "instigated by a group of radicals" [illegible]art of an "organized movement" [illegible]pported by Operation Move-In, El Comité and Stryker Bay. Plaintiffs' cited transcript pages do not support these claims and neither does any other portion of the record.

POINT V

Plaintiffs' basis for relief pursuant to the *Otero* doctrine was without factual or legal merit.

The crux of plaintiffs' action and this appeal is that as more low income residents find permanent homes within the community, then the middle class will flee and the community will become a ghetto. They assert that the doctrine announced in *Otero* v. *New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973) gave them a right to bar low income people from becoming community residents.

Because *Otero* dealt solely with *racial* imbalance within a community and because plaintiffs had no proof of racial imbalance, Judge Cooper held that *Otero* afforded no relief. First, he properly found that the economic range of low income families (including $17,200 annual income) precluded equating persons of low income to minority status. [Op. 58-59]. See also *Boyd* v. *Lefrak,* slip op. 1395, 1399 (2d Cir. Jan. 22, 1975) and *Faraday Wood* v. *Lindsay,* slip op. 585, 590-91 (2d Cir. Dec. 5, 1974). Second, Judge Cooper properly found both as a matter of law and as a matter of fact, based upon expert testimony, that low in-

come people *per se* cannot be associated with anti-social behavior or neighborhood deterioration [Op. 60-61]. Third, based upon the recent sales of brownstones, Judge Cooper properly found that fewer people are selling than several years ago, and the few sales that do take place are at increased prices [Op. 70-71]. Thus, the middle class is *definitely* not fleeing. Finally, Judge Cooper properly held as a matter of law that the quantum of proof required by *Otero* to obtain an injunction was "convincing" proof [Op. 62]. Plaintiffs had no proof, let alone convincing proof, of a racial imbalance within the community.

The *Otero* plaintiffs, as minority low income residents of the Lower East Side community, challenged the action by the New York City Housing Authority which had refused to adhere to its own tenant relocation regulations because of its belief that adherence would create a "non-white pocket ghetto" * which would operate as a "tipping" factor causing the remaining white minority to flee. In the instant action, the appropriate Federal, State and City authorities have approved the conversion of Site 30 from low to middle income housing. These collective judgments are within the parameter of governmental discretion and should not be disturbed unless egregiously wrong. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 929 (2d Cir. 1968); *Citizens Committee for Faraday Wood, supra, slip op.* at 596.

In addition, plaintiffs rely on *Otero* for the theory that the construction of Site 30 will create a "pocket ghetto" within one block of the community. *Otero* is contrary to plaintiffs' theory. In *Otero* this Court did not limit its holding to the consideration of a few blocks within a community but instead considered what the effect of two low income housing projects would have on the *relevant com-*

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* In *Otero*, 484 F.2d at 1126, n. 4, the term "non-white" included Puerto Ricans "for the purpose of this appeal only."

munity. As to the relevant community in *Otero*, it had a 50% white population, a 50% minority population and a 10% loss of white families during the past five years. 484 F.2d at 1136. The statistics involved in *Otero* were as to the entire Lower East Side, not one or two blocks within that community. As to plaintiffs' theory of a West Side pocket ghetto, Judge Cooper properly found both as a matter of law and as a matter of fact that there were no provable objective criteria to determine where a potential pocket ghetto might exist within the West Side community [Op. 90]. If plaintiffs have a viable "pocket ghetto" theory then every residential block of the City in which a public housing project is to be located would become the subject of pocket ghetto trials. As the Court stated in *Berman* v. *Parker*, 348 U.S. 26, 33 (1954):

> "We do not sit to determine whether a particular housing project is or is not desirable."

Within the plaintiffs' chosen pocket ghetto is Trinity's school and middle income housing project. There was no evidence that the school employees or student body or the housing project's residents have been or would be adversely affected in any way by the community's development of the construction of Site 30. The only testimony about this block came from David J. Goodman, who resides three brownstones west of Trinity School and across the street from the Stephen Wise public housing project [Tr. 3130]. He testified that he experienced no problem from the Stephen Wise residents [Tr. 3134] but that Trinity students teased his dog and "had a habit of getting upon the railing of the stoop next to ours to reach and pull down [Christmas tree balls]" [Tr. 3135].

POINT VI

The Department of Housing and Urban Development committed no error pursuant to the National Environmental Policy Act of 1969.

Nothwithstanding plaintiffs' failure to prove that the development of the community or the construction of Site 30 will in any way adversely affect them and notwithstanding the overwhelming proof of the vitality of the community, plaintiffs assert that they are nevertheless entitled to an injunction until HUD corrects the alleged errors that it made in failing to comply with the requirements of the National Environmental Policy Act of 1969 "NEPA").

The trial of this action was, in effect, a *de novo* review of all the factors of the community, the problems of creating enough decent housing for the City's poor, and the massive Federal, State and City governmental efforts to provide decent housing. A host of community residents testified about the observable benefits and strengths of the community, the police testified about decreasing crime, and school administrators testified about superior and improving educational facilities. Also testifying on behalf of the defendants were many Federal, State and City officials who contributed to the development of the West Side Urban Renewal Plan and its current housing plans for the community, including Site 30. From an administrative point of view, it is unlikely that any community within the United States has received so much intensive study, commitment and development. From a trial point of view, it is unlikely that any community has been so thoroughly scrutinized.

Point VI of Judge Cooper's opinion (Op. 92-113) analyzed HUD's actions and concluded that no portion of NEPA was violated. We do not believe that Judge Cooper's

analysis can be improved upon for the purposes of this brief. Every claim now raised by plaintiffs in their brief (pp. 47-63) was factually and legally answered by Judge Cooper. He made no error. We shall briefly touch upon plaintiff's points.

First, plaintiffs assert that HUD erred in not considering alternatives for Site 30 both within and without the community. Judge Cooper properly held [Op. 113] that a consideration of alternatives was not required because the Site 30 project will not significantly affect the environment. However, on this appeal, plaintiffs now claim that, even though an environmental impact statement was not required, HUD was required to study alternatives to Site 30. Plaintiffs now point to Section 102(2)(D) of NEPA, which requires a consideration of "alternatives" as to "any proposal which involves unresolved conflicts concerning alternative uses of available resources". The condition precedent of "unresolved conflicts" did not exist in this action, and plaintiffs offered no proof that it did. Therefore, their current appellate attack is without merit. In considering this particular section of NEPA, *Environmental Defense Fund Inc.* v. *Corps of Engineers,* 492 F.2d 1123 (5th Cir. 1974), stated at 1131 that NEPA "mandates that no agency limit its environmental activity by the use of an artificial framework . . . [and that NEPA] does not intend to impose an impossible standard on the agency". In view of this proper and practical approach to NEPA, it is clear that HUD was not required to consider alternatives to Site 30 both within and without the community. The Site 30 project will be developed and managed by the New York City Housing Authority and is part of the West Side Urban Renewal Plan. HUD's function was to determine whether federal expenditure for this project was proper. There was no issue that the proposed public housing should be built outside the community or elsewhere within the community. The question of "unresolved conflicts" of "alternatives" was neither relevant nor put in issue by plaintiffs.

Within the community all undeveloped sites have either public or private sponsors [Exhibit S and Op. 36]. Also, notwithstanding a housing shortage outside the community, it is not realistic for HUD to consider whether Site 30 was the best place for the "next" expenditure of federal housing funds within New York City. In fact, Judge Cooper, in determining that a consideration of alternatives was not required, accepted the fact that there were no realistic alternatives. Accordingly, plaintiffs' current claim lacks factual and legal foundation.

Second, plaintiffs claim that HUD's Special Environmental Clearance Study did not consider enough factors. However, Judge Cooper found that it considered the community, the larger West Side area, and the Site 30 block in terms of population density, racial make-up, community facilities and all other relevant factors capable of study. The superficial defects asserted by plaintiffs of insufficient analysis of schools and crime were proved at trial to be no defect.

Finally, plaintiffs say that their expert, Harry Foden, proved that HUD's study was defective. A brief analysis of Mr. Foden's testimony establishes otherwise. Foden admitted that he never reviewed any other NEPA study by HUD [Tr. 2913], was not competent to give an opinion on the legal requirements of NEPA as they applied to HUD [Tr. 2879-80], and had no knowledge of the West Side Urban Renewal Area [Tr. 2911]. Although he claimed that the NEPA study should have had more depth, the only specific matter he pointed to was that it did not show how many people and children would reside at Site 30 [Tr. 2881]. However, the study projected the population at 576 including about 356 children [Tr. 2882, 2884]. Finally, he thought the "fear" of the middle class should have been studied, but he admitted that he did not know how to study that fear [Tr. 2906]. Plaintiffs' "expert" challenge to HUD's study established nothing.

POINT VII

The designations of Sites 4 and 30 by the City Planning Commission and the Board of Estimate were proper.

Plaintiffs argue that the conversions of Sites 4 and 30 to low income housing were improper because there had been no formal change to the Urban Renewal Plan as required by Article 15 of the General Municipal Law [App. Br. 79]. This argument is without merit.

Section 505 of Article 15 of the General Municipal Law requires the New York City Housing and Development Administration to submit a proposed amendment to the Urban Renewal Plan to the City Planning Commission. The City Planning Commission holds a hearing on the amendment and reports the change to the Board of Estimate, who must then approve the change. A low income housing project must also be approved by the appropriate governmental bodies pursuant to Section 150 of the New York State Public Housing law. That section, similar to Section 505 of Article 15 of the General Municipal Law, requires submission of the plan for low income housing to both the City Planning Commission and the Board of Estimate.

The District Court found that there has been substantial compliance with all of the requirements of Section 150 of the Public Housing Law and Section 505 of Article 15 of the General Municipal Law, and therefore the plaintiffs had not been deprived of any "substantial right or of procedural due process" [Op. 115-16]. HDA, pursuant to their authority, had requested approval by the City Planning Commission of the conversion of Sites 4 and 30 to low income housing [Exs. 23 and 25]. A separate public hearing was held on each site; Site 4 in 1970, Site 30 in 1971. Both sites were approved by the City Planning

Commission and reports of the approval and recommendations were submitted to the Board of Estimate [Exs. 24 and 26]. The Board of Estimate held a public hearing on Site 4 and approved the conversion in 1970 [Ex. 28]. The Board of Estimate held a public hearing on Site 30 and approved the conversion in 1971 [Ex. 27]. The District Court noted that, in each of the public hearings, the plaintiffs were present, had ample opportunity to express their opposition and did express their opposition to the conversion of both sites [Op. 118]. The Court also noted that the reports of the City Planning Commission and the Board of Estimate stated that the conversion of Sites 4 and 30 had been considered in the context of the Urban Renewal Plan and "found it to be consistent with the overall development of the Area" [Op. 118].

In their brief, plaintiffs argue that the City did not comply with Section 514 of the General Municipal Law because it did not secure the consent of the New York State Commissioner of Housing and Community Renewal [App. Br. 83]. The District Court rejected the argument noting that the testimony of Commissioner Goodwin indicated that the State supported the conversion of Sites 4 and 30 [Op. 119]. Plaintiffs also argue that the written consent of the owners or the lessees of the pilot project area is required before the Urban Renewal Plan can be amended [App. Br. 84]. The merits of this issue have been discussed in Point III, *supra,* at p 10. The District Court in rejecting each of the plaintiffs' technical contentions relating to the conversions of Sites 4 and 30 pointed out that the plaintiffs did not raise this issue "until the last minute (a lapse of almost 2½ years from the commencement of the action to the conclusion of trial) . . ." [Op. 119] and that these issues were not among those stipulated at trial.

CONCLUSION

The judgment appealed from should be affirmed with costs.

Dated: New York, New York
March 3, 1975.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-7061

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 3rd day of March 1975 she served a copy of the within appellee's brief

by placing the same in a properly postpaid franked envelope addressed:

Demov, Morris, Levin & Shein, Esqs.,
40 East 57th St.
NY NY 10019

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

3rd day of March 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975